

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3	DARRELL GREEN & MITZY)	
4	BUCHHOLZ, JEFF DYKES and)	
5	BRUCE A. HAHN,)	PCHB NOS. 91-139,
6)	91-141 and 91-149
7	Appellants,)	
8	v.)	FINAL FINDINGS OF FACT,
9)	CONCLUSIONS OF LAW
10	STATE OF WASHINGTON,)	AND ORDER
11	DEPARTMENT OF ECOLOGY,)	
12)	
13	Respondent.)	

14 This matter came on for hearing before the Pollution Control Hearings Board,
15 William A. Harrison, Administrative Appeals Judge, presiding. Board Members
16 Harold S. Zimmerman, Chairman; Annette S. McGee and Robert V. Jensen have considered
17 the record.

18 These matters are the appeals from denials by the Department of Ecology of
19 applications to appropriate public groundwater.

20 Appearances were as follows:

- 21 1. Attorney Richard B. Price, appeared for Green and Buchholz and Dykes.
- 22 2. Kerry O'Hara, Assistant Attorney General appeared for the Department of Ecology.
- 23 3. Bruce Hahn appeared by his successor in interest, Richard Lange.

24 The hearing was conducted at Okanogan, Washington, April 27 and 28, 1992.

25 Molly Roberts provided court reporting services.

26 **FINAL FINDINGS OF FACT,**
27 **CONCLUSIONS OF LAW & ORDER**
 PCHB Nos. 91-139, 141, 149

Witnesses were sworn and testified. Exhibits were examined. Post-trial briefs were filed. The last of these was filed on July 31, 1992. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

These cases arise near Omak. These are appeals by Green and Buchholz, Hahn and Dykes of certain denials by the State Department of Ecology of applications to appropriate public groundwater. The appeal of Swann was continued on appellant's motion.

II

Background. The State, by its Department of Ecology ("Ecology"), has designated an area just north of Omak as the "Duck Lake Ground Water Management Subarea." WAC 173-132-010. This designation by administrative regulation occurred in 1974. The regulations note that the Duck Lake aquifer is naturally recharged primarily through groundwater migration from Johnson Creek. WAC 173-132-010(3). Also, that the aquifer is artificially recharged through waters diverted into the area by the Okanogan Irrigation District. WAC 173-132-010(4). The purpose of designating the Duck Lake Subarea was to manage groundwaters so as to provide a safe sustaining yield, as far as possible, to those with water rights in the Subarea.

III

The total natural recharge from deep percolation of precipitation and flow from Johnson Creek is 1.972 acre feet per year.

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2 IV

3 An adjudication of water rights in the Duck Lake Subarea was conducted by the
4 Okanogan County Superior Court, in 1986. The rights in the Subarea then totaled 10,662 acre
5 feet per year (4,082 acre feet primary and 6,580 acre feet, supplemental).

6 V

7 The public ground waters of the Duck Lake Subarea are highly over-appropriated. It is
8 probable that even existing public groundwater rights must rely on the recharge activity of the
9 Okanogan Irrigation District.

10 VI

11 Green and Buchholz. The property involved in the Green and Buchholz appeal consists
12 of 20 acres. It is located north of Omak and within the Duck Lake Subarea. The initial
13 owner, Ronald J. Fisher, applied to Ecology in 1974 to appropriate public groundwater for
14 domestic supply and irrigation of the 20 acres. An instantaneous rate of 150 gallons per
15 minute was requested. Mr. Fisher again applied to Ecology in 1978 to appropriate public
16 groundwater at the same site for an 18 unit mobile home court. This was in lieu of, not in
17 addition to, his first application. An instantaneous rate of 150 gallons per minute was
18 requested.

19 VII

20 Concerned not only with the extent of appropriation in the Subarea, but also
21 contemplating an adjudication of the Subarea, Ecology took no action on the Fisher
22 applications. It did, however, advise Mr Fisher of an exemption which would allow
23 withdrawal of 5,000 gallons per day for domestic purposes. Ecology suggested that a 10 unit
24 mobile home court might fit within that exemption. This was in 1978. In that same year

1 Mr. Fisher obtained County plat approval for an 18 unit mobile home court. During his
2 ownership, Mr. Fisher developed only 9 mobile home units on the property.

3 VIII

4 In 1984 Mr. Fisher sold the property to Virgil and Lorraine Green. During the
5 adjudication in Okanogan County Superior Court, Mrs. Green gave accurate testimony that
6 there were yet only 9 mobile home units in place on the property. This was in 1986. The
7 adjudication referee then recommended confirmation of a water right to Mr. and Mrs. Green
8 under the theory of exemption stated in RCW 90.44.050. The right was delimited as 37
9 gallons per minute, up to 4.5 acre feet per year for group domestic supply to a 9 unit mobile
10 home park. The priority was set by the referee as being 1974.

11 IX

12 In 1986, Mr. and Mrs. Green sold the property to their grandson, Mr. Darrell Green
13 and his wife, Mitzy (Buchholz) Green. Mr. and Mrs. Darrell Green added 5 mobile home
14 units in 1987, bringing the total to 14 units where matters stand at present.

15 X

16 In 1991, Ecology denied both the 1974 and 1978 applications filed by Mr. Fisher to
17 which Mr. and Mrs. Darrell Green had succeeded. Mr. and Mrs. Green now appeal those
18 denials. Both applications were cited in their notice of appeal.

19 XI

20 Ecology's denials of the applications were based upon its determination that public
21 groundwater was not available, that the proposed appropriation would impair existing rights
22 and be contrary to the public welfare.

1
2 XII

3 Dykes. The property involved in the Dykes appeal consists of 40 acres. It is located
4 north of Omak and within the Duck Lake Subarea. The initial owner, Robert Hahn, applied to
5 Ecology in 1973 seeking to appropriate public groundwater for the irrigation of 40 acres
6 (300 gallons per minute). The property was sold to Mr. Jeff Dykes. No right was confirmed
7 to Mr. Dykes in the adjudication in Okanogan County Superior Court.

8 XIII

9 Hahn. The property involved in the Hahn appeal consists of 20 acres. It is located
10 north of Omak and in the Duck Lake Subarea. Mr. Bruce Hahn, in 1974, applied to Ecology
11 seeking to appropriate public ground water for domestic supply and irrigation of 20 acres (200
12 gallons per minute). In the Okanogan County Superior Court adjudication, a water right was
13 confirmed to Mr. Bruce Hahn for domestic supply at 10 gallons per minute, 3 acre feet per
14 year. Mr. Bruce Hahn has sold the property to Mr. Richard Lange.

15 XIV

16 Ecology denied the Dykes and Hahn (Lange) applications on the same basis as the
17 Green and Buchholz applications. Both Dykes and Hahn (Lange) appeal these denials.

18 XV

19 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

20 From these Findings of Fact, the Board issues these:

21 CONCLUSIONS OF LAW

22 I

23 The Board has jurisdiction over the parties and the subject matter.

24 Chapters 43.21B, 90.44 and 90.03 RCW

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 91-139, 141, 149

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II

As a threshold matter, Ecology objects to consideration in this case of the 1978 Fisher application. The same is cited in the appeal lodged here by Green and Buchholz. Its denial is properly here for review.

III

The issues in this case are:

1. Whether there is public ground water available?
2. Whether the applicants are entitled to exemption under RCW 90.44.050 for 5,000 gallons per day?
3. Whether the state is required to issue permits to establish priority?
4. Whether the applicants (Greens) are entitled to 37 gallons per minute; 4.5 acre feet per year, for use as a group domestic water supply in accordance with the Findings in the Duck Lake Adjudication?

Ecology objects to the fourth issue which was added on the motion of Mr. and Mrs. Green.

Specifically, Ecology urges that:

The right confirmed to the Greens through the Duck Lake Adjudication, which provides the basis for these additional issues, is not properly before this Board as it is not a permit decision within the Board's jurisdiction. Respondent's Closing Argument, p. 7, lines 17-20.

There is no merit in that contention. While the meaning of the adjudication must be taken at face value, the right granted there bears upon the proper disposition of the permit dispute now pending here. The issues are therefore properly set forth. We take these up in turn.

IV

Public Groundwater Available? The first issue for consideration is whether public ground water is available. This is one of the four substantive criteria governing Ecology's

1 decision under RCW 90.03.290: 1) beneficial use, 2) availability of public water, 3) non-
2 impairment of existing rights, and 4) the public welfare. Stempel v. Department of Water
3 Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).
4

5 V

6 In addition to the foregoing substantive criteria of RCW 90.03.290, Ecology must
7 manage the use of ground water to maintain a "safe sustaining yield" for prior appropriators.
8 RCW 90.44.130.

9 VI

10 The excess of water rights (10,662 acre feet per year) over natural recharge (1,972 acre
11 feet per year) in the Duck Lake Subarea results in what is known as "water mining". This
12 refers to the consumptive use of water beyond nature's ability to replace it. In Lamberton
13 v. Ecology, PCHB No. 89/95 (1990) we held as follows:

14 *The problem in the instant case is most simply described as one of water*
15 *availability, although, as often happens, there is an overlap with the existing*
16 *rights and public interest categories . . .*

17 Then citing the requirement in RCW 90.44 130 for a "safe sustaining yield" we held:

18 *This does not mean that stored groundwater may never be taken. It means,*
19 *rather, that the appropriation of waters in excess of annual recharge can be*
20 *allowed only under circumstances where the ability of existing rightholders to*
21 *fully satisfy their rights by reasonable means can be guaranteed.*

22 VII

23 In this case, appellants have not shown the existence of any stored public groundwater.
24 To the contrary, the evidence suggests that only the artificially stored and imported waters of
25 the Okanogan Irrigation District are absorbing the overdraft of public groundwaters. The
26 approval of significant groundwater appropriations as requested by appellants could therefore
27

1 only impair existing rightholders due to the complete appropriation, and overappropriation, of
2 public groundwater.

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4 VIII

5 Ecology was correct in concluding that there is no public groundwater available for the
6 amounts and uses in the appellants' applications. Ecology was correct in denying those
7 applications under RCW 90.03.290 and RCW 90.44.130.

8 IX

9 Entitlement to Exemption Under RCW 90.44.050? Ecology does not contest the
10 Greens' right to an exemption under RCW 90.44.050. Respondent's Closing Argument,
11 p. 21, lines 12-13. Presumably this is true for the other appellants also. The exemption
12 provides:

13 *That any withdrawal of public groundwaters . . . for single or group domestic*
14 *uses in an amount not exceeding five thousand gallons a day, is and shall be*
exempt . . .

15 X

16 The Greens assert entitlement, however, to one such exemption in response to the 1974
17 application of Mr. Fisher, another for the 1978 application of Mr. Fisher and yet another for
18 the Greens' addition of mobile home units during their ownership. The total entitlement urged
19 by the Greens under the exemption is therefore 15,000 gallons per day. Opening
20 Memorandum of Appellants, p. 6, lines 7-22.

21 XI

22 The Greens' claim of exemption entitlement to 15,000 gallons per day is incorrect.
23 The purpose of the Public Ground Water Code is to extend the application of surface water
24 statutes to the appropriation and beneficial use of ground waters within the state.

1 RCW 90.44.020. Under the Surface Water Code:

2
3 *The right to the use of water which has been applied to a beneficial use in the*
4 *state shall be and remain appurtenant to the land or place upon which the same*
is used. RCW 90.03.380.

5 This provision ties the water right to the parcel of property in question. It cannot be
6 multiplied either by the filing of successive applications nor by transferring the property and
7 water right to another. Each of the Green, Dykes and Hahn properties in these appeals is
8 therefore entitled to one 5,000 gallon per day appropriation of public ground water under the
9 exemption of RCW 90.44.050.

10 XII

11 Exemptions to the water code, which is an environmental statute, are to be narrowly
12 construed. See Stempel, above and English Bay v. Island County, 89 Wn.2d 16, 20, 68 P.2d
13 783 (1977).

14 XIII

15 State Required to Issue Permits to Establish Priority? The exemption language of
16 RCW 90.44.050 goes on to provide that:

17 *. . . at the option of the party making withdrawals of ground waters of the*
18 *state not exceeding five thousand gallons per day, applications . . . may be filed*
19 *and permits and certificates obtained in the same manner and under the same*
20 *requirements as in the case of withdrawals in excess of five thousand gallons a*
day.

21 Therefore, at their option, appellants are entitled to state permits and certificates
22 memorializing the entitlement of their exempt appropriation. The same, however, must be
23 requested with reasonable clarity. The application now on appeal, each seeking amounts far in
24 excess of the exempt entitlement, lack the clarity necessary to inform Ecology that only an

1 exemption permit is sought. Therefore, if appellants elect to request an exemption permit, that
2 request must be made specifically.

3
4 XIV

5 Whether the Applicants (Greens) Are Entitled to 37 Gallons Per Minute; 4.5 Acre Feet
6 Per Year for Use as a Group Domestic Water Supply per the Duck Lake Adjudication? The
7 Duck Lake Adjudication has confirmed 37 gallons per minute, 4.5 acre feet per year to the
8 Greens based upon the development of 9 mobile home units at the time of adjudication. The
9 Greens now assert this right in addition to rights afforded by the exemption of RCW 90.44.050
10 relating to 5,000 gallons per day. The adjudicated right and the exemption right are not
11 additive, however. In his report, the Referee of the Duck Lake Adjudication cites the 5,000
12 gallon per day exemption of RCW 90.44.050 as the basis for the right confirmed by him to the
13 Greens. Report of Referee, p. 178, lines 22-26. (Exhibit R-31 of this record). Indeed, it
14 could hardly be otherwise as new appropriation of public ground waters have been allowed
15 only by written permit since 1945. RCW 90.44.050. The Greens' well was developed after
16 1945 while there is no written permit. Therefore the adjudicated right represents the Greens'
17 appropriation to the date of adjudication under the exemption of RCW 90.44.050.

18 XV

19 The adjudicated right contemplated service to 9 mobile home units in 1986. The
20 Referee computed the right based upon 1/2 acre foot per year per mobile home. Report of
21 Referee, p. 179, lines 4-8. By comparison, the full 5,000 gallon per day exemption to which
22 the Greens are entitled equals 5.6 acre feet per year. This is a little more than one acre foot
23 beyond the adjudicated 1986 usage. By the reasoning of the Referee that each mobile home
24 needs 1/2 acre foot per year, this additional acre foot would serve 2 mobile homes for a total
25 of 11 mobile homes. The service of 14 mobile homes at the present time may therefore result

1 in over appropriation by the Greens of their exempt entitlement. The limit of that entitlement
2 is 5,000 gallons per day regardless of any plat or plans for an 18 unit mobile home court.
3

4 XVI

5 Finally, the Greens urge that Ecology is estopped to prevent the Greens from making
6 their desired appropriation. The essence of this claim is that Ecology advised Mr. Fisher to
7 limit his appropriation, pending disposition of his applications. This resulted in 9 rather than
8 18 mobile home units being developed. Next, the Greens assert that Ecology now denies their
9 applications because water had not been put to beneficial use for more than 9 units. Opening
10 Memorandum of Appellants, p. 11, lines 9-11. This final assertion is erroneous. Whether the
11 Greens had served only 9 units, or more, had no bearing on Ecology's correct conclusion that,
12 exempt appropriations aside, public ground water is not available. It is that conclusion, and
13 not the number of units being served, that leads to the denial of these applications. Equally
14 erroneous is the assertion by the Greens that the Referee erred as a result of the inadvertence
15 of Lorraine Green's testimony at the adjudication. *Id.* p. 7, lines 14-16. Mrs. Green's
16 testimony regarding 9 units in use, as opposed to a plan to serve 18 units, was entirely
17 accurate. Testimony concerning a desire to serve 18 mobile home units, whether offered
18 during the adjudication or now, would be ineffective to advance the Greens' rights beyond the
19 5,000 gallons per day provided by RCW 90.44.050. Ecology is not estopped to take the
20 action which it did in these matters.

21 XVII

22 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.


23 From the foregoing, the Board issues this:
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ORDER

The denial by the Department of Ecology of appellants' applications to appropriate public groundwater is affirmed; provided, however, nothing herein shall prevent, at the appellants' option, the issuance of permits for appropriation under RCW 90.44.050 in an amount not exceeding 5,000 gallons per day.


DONE this 3rd day of November, 1992.


HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Chairman


ANNETTE S. MCGEE, Member


ROBERT V. JENSEN, Attorney Member

P91-139F

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DARRELL GREEN & MITZY)	
BUCHHOLZ, JEFF DYKES and)	
BRUCE A HAHN,)	PCHB NOS. 91-139
)	91-141 and 91-149
Appellants,)	
)	
v)	ORDER DENYING
)	RECONSIDERATION
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	
)	
Respondent)	

On November 16, 1992, Ecology filed its Request for Clarification regarding the final order entered in the above matter

On December 3, 1992, Green, et. al., filed its Objection to Respondents' Motion for Clarification requesting costs on grounds that the motion is frivolous

On December 9, 1992, Ecology filed its Reply

Having considered the foregoing together with the records and file herein, and being fully advised, we rule as follows.

I

The Request for Clarification is in the nature of a motion for reconsideration and will be considered as such

II

The portion of our order at issue reads.

provided, however, nothing herein shall prevent, at the appellants' option, the issuance of permits for appropriation

1 under RCW 90 44 050 in an amount not exceeding 5,000 gallons
2 per day. (Emphasis added)

3 III

4 Ecology urges that the words "issuance of" in the order must be replaced with the
5 words "application for" The rationale for this request, cited by Ecology, is that Ecology
6 retains discretion to either grant or deny a permit for the right accorded by the exemption We
7 disagree

8 IV

9 The basis cited by Ecology for its claim of discretion is this language in
10 RCW 90 44.050:

11 . Provided, further, that at the option of the party making
12 withdrawals of groundwater of the state not exceeding five
13 thousand gallons per day applications under this section or
14 declarations under RCW 90.44 090 may be filed and permits and
15 certificates obtained in the same manner and under the same
16 requirements as in this chapter provided in the case of
17 withdrawals in excess of five thousand gallons a day
18 (Emphasis added)

19 This will be referred to as the "proviso" of RCW 90 44 050

20 V

21 Ecology contends that this proviso gives it the right and responsibility to apply the tests
22 of 1) water availability, 2) impairment, 3) beneficial use and 4) public welfare, as set out in
23 RCW 90 03 290, where a permit is sought for exempt appropriations of 5,000 gallons per day
24

25 VI

26 The meaning of the above proviso from RCW 90 44 050, however, cannot be found by
27 reading it in isolation from the balance of that section Prior language in that section must
also be considered, and it reads as follows

1
2 That any withdrawals of public ground waters . . . in an amount not
3 exceeding five thousand gallons a day, is and shall be exempt from the
4 provisions of this section, but, to the extent that it is regularly used beneficially,
5 shall be entitled to a right equal to that established by a permit issued, under the
6 provisions of this chapter. .(Emphasis added.)

7 This will be referred to as the "main body" of RCW 90 44 050.

8 VII

9 One holding a groundwater exemption right holds "a right equal to that established by a
10 permit" as set forth in the main body of RCW 90.44 050. The purpose of the proviso in RCW
11 90 44 050 is to allow the exempt right holder to obtain a written indicia of that right in the
12 form of a permit. It is not the purpose or meaning of the proviso that Ecology be vested with
13 discretion to deny the indicia, i.e. permit, for an exemption right granted by statute. The
14 phrase of the proviso, "in the same manner and under the same requirements" refers to permit
15 application procedures. That phrase cannot be read to invoke the discretion of Ecology,
16 appropriate to non-exempt rights, without thwarting both the exemption right established in the
17 main body of RCW 90 44.050 and the proviso's purpose of providing for written evidence of
18 that right. That proviso exists for the benefit of exempt right holders who adhere to the adage
19 that

20 *"The palest ink is more powerful than the strongest memory."*

21 Appellants are entitled to their ink from Ecology

22 VIII

23 Nothing herein shall abridge the rule that first in time is first in right
24 RCW 90.03 010

25 WHEREFORE, IT IS ORDERED that the motion and costs are each denied. The final order
26 is reaffirmed

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DONE at Lacey, WA, this 5th day of February, 1993

William A. Harrison
HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

POLLUTION CONTROL HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee
ANNETTE S. MCGEE, Member

Robert V. Jensen
ROBERT V. JENSEN, Attorney Member

P91-139R